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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 459

CY MILLER and BILLIE MILLER,

Petitioners and Appellants,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ALCOHOLIC CONTROL APPEALS BOARD,

Defendants and Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

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CY MILLER and BILLIE MILLER,

Petitioners and Appellants,

vs.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ALCOHOLIC CONTROL APPEALS BOARD,

Defendants and Respondents.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

Petitioners pray that a Writ of Certiorari issued to review the judgment of the District Court of Appeal of the State of California entered in the above case on May 20, 1958.

Opinions Below.

The opinion of the District Court of Appeal is attached hereto, marked Exhibit "A" and made a part hereof by reference. The official citation for said decision is 160 A. C. A. 709. The Supreme Court of the State of California denied a hearing without opinion.

The Grounds on Which Jurisdiction of This Court Is Invoked Are as Follows:

A. The judgment of the Superior Court of the State of California in and for the County of Los Angeles is dated May 28, 1957.

B. The decision of the District Court of Appeal of the State of California, Second Appellate District, affirming said judgment was made on May 20, 1958. Said judgment became final on July 20, 1958. The Supreme Court of the State of California denied a hearing on July 16, 1958. (A judgment does not become final in California until the expiration of 60 days after it shall have been pronounced by the court. *People v. Walker*, 76 Cal. App. 192, 201.)

C. Jurisdiction is conferred on this Court to review the judgment in question by Writ of Certiorari by reason of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The Questions Here Presented for Review Are as Follows:

Was due process of law denied: 1. By the Department of Alcoholic Beverage Control in holding a hearing without giving the petitioners notice either by registered or certified mail or other mail or personal service of the time and place such a hearing was to be held on accusations filed against the petitioners.

2. By the Department of Alcoholic Beverage Control in holding such a hearing in violation of the following constitutional rights of the petitioners:

(a) the right to be informed of the charges being made against them;

(b) the right to file a notice of defense to said accusation as provided for by Section 11506 of the Government Code;

(c) the right to be present at the hearing to confront and cross-examine the witnesses for the prosecution and to present evidence in petitioners' defense;

(d) the right to be represented by counsel;

(e) the right to a fair and impartial hearing.

3. By the Department of Alcoholic Beverage Control in refusing to reconsider the first decision of revocation on the ground that petitioners had not received notice of the hearing.

4. By the Department of Alcoholic Beverage Control in refusing to allow petitioners the right to present evidence by way of mitigation as provided for by Section 11520 of the Government Code after the reversal of the revocation by the Appeals Board.

5. By the Alcoholic Beverage Control Appeals Board in remanding the case to the Department after making a reversal of Count 5 for reconsideration of the penalty but including in the decision a statement that the incidents are ample to support an order of revocation, thus denying to the petitioners a fair and impartial hearing on the cause for reconsideration of the penalty.

6. By the Superior Court of Los Angeles County, the District Court of Appeal and the Supreme Court of the State of California in refusing to set aside the decision of the Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board, despite petitioners' uncontroverted allegations that notice of the hearing upon which the revocation was based had not been served upon the petitioners prior to said hearing.

The Constitutional Provisions and Statutes Which This Case Involves Are as Follows:

1. The California Constitution, Article XX, Section 22, as amended on November 2, 1954.

The Following Sections of the Government Code of the State of California:

Gov. Code, Sec. 11500, amended by Stats. 1947, Chap. 491, subsec. 1, p. 1469;

Gov. Code, Sec. 11501, amended by Stats. 1953, Chap. 961, Sec. 1; Stats. 1955, Chap. 453, Sec. 1;

Gov. Code, Secs. 11503, 11505, 11506, 11509, 11513, 11520, 11521, 11523.

The applicable statutes of the State of California are attached hereto in an appendix and set forth at length and marked Exhibit "B" and made a part hereof by reference.

Statement of the Case.

An accusation was filed against petitioners about March 6, 1956, by the Area Administrator of the Department of Alcoholic Beverage Control of the State of California. Copies of this accusation were mailed to petitioners at 326 South Spring Street, Los Angeles, California, on March 21, 1956, by certified mail. This mail was not delivered by the postoffice and was not received by the petitioners. Thereafter, the department set the matter for hearing for June 4, 1956, before a hearing office without any notice to the petitioner. The first notice that petitioners had of the hearing or that an accusation had been filed against them was about noon on June 4, 1956, when one of the witnesses at the hearing informed them that he had just testified at the hearing. Petitioners' attorney immediately contacted the hearing officer and requested that the peti-

tioners be given an opportunity to defend themselves in the afternoon session against whatever charges had been made. This request was refused. The hearing officer stating that the hearing had been completed at forenoon and that the matter would have to be taken up with the Sacramento office of the Department.

On the same date petitioners' attorney requested the Sacramento office of the Department to set aside the hearing, to furnish petitioners with a copy of the accusation and to reset the matter for a hearing on a day certain upon the ground that the petitioners had had no notice of the hearing held. The Department denied this request.

The hearing officer made certain findings of fact adverse to the petitioners and recommended that the license of petitioners be suspended for thirty days on one count, and that the license be revoked on another count. This recommendation was adopted by the Department on July 6, 1956.

Petitioners prior to the effective date of the decision and within the time allowed by law filed a petition for reconsideration with the Department. This petition was similarly denied by the Department without testimony or argument and without notice to the petitioners.

Your petitioners thereupon appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board rendered its decision on January 21, 1957, affirming the decision of the Department as to the suspension of petitioners' license and reversing as to the portion revoking the petitioners' license. In its reversal, the Appeals Board said:

"However, the reversal of Count 5 is confined to the question of penalty. The Director of the Depart-

ment of Alcoholic Beverage Control is free to impose a penalty of revocation upon the facts found to be true or conduct a further hearing to substantiate all of the facts set forth with further evidence."

The petitioners thereafter, on February 25, 1957, within the time allowed by law and provided for by Section 11520 of the Government Code of California, petitioned the Department for the further hearing to allow petitioners to make their showing by way of litigation. No action was taken by the Department upon this request.

On March 7, 1957, the Department rendered its decision after remand by the Alcoholic Beverage Control Appeals Board, stating therein: "The Department has reconsidered the penalties to be imposed in the light of the decision and order of the Alcoholic Beverage Control Appeals Board" and thereupon the following decision was rendered: "That the license be suspended for thirty days on Count 2 and that the said license be revoked on Count 5, effective April 18, 1957".

On April 11, 1957, your petitioners filed with the Superior Court of the State of California, County of Los Angeles, a petition for a writ of mandamus under Section 1094.5 of the Code of Civil Procedure of the State of California, alleging in their petition the foregoing facts. In addition your petitioners alleged that if they had received a copy of the accusation they would have been prepared to answer the accusation in each and every particular and would have prepared a full, complete and adequate defense to each and every count and specification of the accusation at the hearing. They further alleged that if they had been given the opportunity to defend themselves that the accusation would have been dismissed or that the

decision of the Department would have been favorable to them and their license not suspended or revoked.

Petitioners alleged further that the acts of the Department were invalid, that the Department proceeded without or in excess of its jurisdiction in that petitioners did not receive notice of the filing of the accusation and did not have a fair and impartial trial in the hearing held; that the Department abused its discretion in that it deprived petitioners of their right to make what showing they could by way of mitigation as provided in Section 11520 of the Government Code.

Petitioners also alleged in their petition that the Alcoholic Beverage Control Appeals Board abused its discretion it that it failed to consider the fact that the petitioners had at no time prior to the appeal been afforded a fair and impartial trial before the Department, nor had they actually been given notice of the hearing, but instead the Appeals Board decided the appeal strictly upon the fact that a copy of the accusation had been mailed to the petitioners. It was alleged that the Appeals Board failed to pass upon the question of whether the constitutional rights of the petitioners had been denied and jeopardized. The Superior Court issued an alternative writ of mandamus. In due course, the respondents filed their return by way of answer. The answer alleged that notice of the accusation had been sent to the petitioners by certified mail. No issue was made of the petitioners' allegations that they had not received notice of the accusation nor that they had received notice of the hearing. The Superior Court on April 26, 1957, upheld the actions of the respondents Department and Appeals Board. The District Court of Appeal affirmed the judgment of the Supreme Court. Thereupon, a petition was filed with the Supreme Court of the

State of California for a hearing of the decision rendered by the District Court of Appeal which was denied by the Supreme Court.

The District Court of Appeal decided the case on the ground that the filing of a petition for a writ of mandamus in the Superior Court had been premature in that petitioners had not exhausted their administrative remedies by not appealing to the Appeals Board from the second order of revocation by the Department.

In the petition filed with the Supreme Court of California, the petitioners alleged that there were at least two important questions of law that should be settled by the Supreme Court and that these questions of law were (1) can valuable property rights be deprived liquor license holders when they have no knowledge of the accusation filed or of the hearing held although the accusation is sent them by certified mail but not received. (2) Must the Department of Alcoholic Beverage Control allow petitioners to make their showing by way of mitigation or to state it otherwise is the last sentence of Section 11520 of the Government Code meaningless.

The Supreme Court denied the petition for a hearing without an opinion.

The Federal Questions Sought to Be Reviewed Here Were Raised in the Court of First Instance, to wit, the Superior Court of the State of California, in and for the County of Los Angeles.

In the petition filed in the Superior Court petitioners alleged that the acts of the Department were invalid, that the Department had proceeded without or in excess of its jurisdiction in that petitioners had not received notice of the filing of the accusation and did not have a fair

and impartial trial in the hearing held and abused its discretion in that it had deprived petitioners of their right to make what showing it could by way of mitigation as provided for in Section 11520 of the Government Code of California. Petitioners also alleged in their petition that the Alcoholic Beverage Control Appeals Board had abused their discretion in that it had failed to consider the fact that the petitioners had at no time prior to the appeal been afforded a fair and impartial trial before the Department nor had they actually been given notice of the hearing but that instead the Appeals Board decided the appeal strictly upon the fact that a copy of the accusation had been mailed to the petitioners; that the Appeals Board had failed to pass upon the question of whether the Constitutional rights of the petitioners had been denied and jeopardized.

The Superior Court affirmed the decision of the respondents, Department and Appeals Board, without passing upon the constitutional questions. The basis of the Superior Court's refusal to consider the constitutional questions involved was that the petitioners had not appealed to the Appeals Board from the second decision of the Department. The Superior Court concluded that the petitioners had not exhausted their administrative remedies and could not have the matter reviewed by the Superior Court. With respect to the petitioners allegations before the Superior Court that they had petitioned the Department to be permitted to produce evidence in mitigation as provided by Government Code, Section 11520, the Superior Court in an opinion answered this by stating "It is assumed that this petition was denied."

ARGUMENT IN SUPPORT OF WRIT OF CERTIORARI.

I.

The Petitioners Were Not Afforded Due Process of Law.

Section 11505 of the Government Code of California, among other things, provides as follows:

(a) "Upon the filing of the Accusation the Agency shall serve a copy thereof on the respondent as provided in subdivision c. The Agency may include with the Accusation any information which it deems appropriate but it shall include a post card or other form entitled Notice of Defense which when signed by or on behalf of the respondent and returned to the Agency will acknowledge service of the Accusation and constitute a notice of defense under Section 11506. A copy of the Accusation shall include or be accompanied by a statement that respondent may request a hearing by filing a Notice of Defense as provided in Section 11506 within fifteen days after service upon him of the Accusation and that failure to do so will constitute a waiver of his right to a hearing."

(b) "The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the Agency within fifteen days after the Accusation was personally served on you or mailed to you (here insert name of Agency) may proceed upon the Accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense or by delivering or mailing a Notice of Defense as

provided by Section 11506 of the Government Code to (here insert name and address of Agency)."

(c) "The Accusation and all accompanying information may be sent to respondent by any means selected by the Agency. But no Order adversely affecting the rights of the respondents shall be made by the Agency in any case unless the respondent shall have been served personally or by registered mail as provided herein or shall have filed a Notice of Defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the Agency and to notify the Agency of any change, and if a registered letter containing the Accusation and accompanying material is mailed addressed to respondent at the latest address on file with the Agency."

It is not disputed in this case that the petitioners did not receive a copy of the Accusation mailed by certified mail by the Department of Alcoholic Beverage Control. (The Accusation that was mailed to the petitioners, *it is undisputed, did not contain a Notice of the time and place of hearing,* but in fact only contained a copy of the Accusation and it is conceded that it also contained either a post card or other form entitled "Notice of Defense"). There are no cases in California squarely in point interpreting Section 11505 of the Government Code. There are several cases which have upheld the validity of procedural requirements of service by mail, notably, *Bess v. Park,* 144 Cal. App. 2d 798, which involved the constitutionality of procedural rules promulgated by the Labor Commissioner concerning hearings under Section 1647 of the Labor Code. In that case the validity of the

rule providing for service of notices of hearing upon licensed employment agencies by ordinary mail was upheld. However, the Appellate Court pointed out that Section 11978 of the Labor Code provided:

> *"Evidence that the party has received the notice of hearing must be established prior to or at the time of hearing."*

In *People v. One 1941 Chrysler Sedan*, 81 Cal. App. 2d 18, 26, a Notice of Seizure and intended forfeiture was filed in the Superior Court and was served on the registered and legal owners by registered mail on the same day. Neither owner appeared or contested the proceeding, the defaults were taken and a Judgment forfeiting the vehicle to the State was entered. A motion was filed requesting the vacating of the default Judgment and permission to file an Answer in the original forfeiture proceedings. The motion was based on the ground that the legal owner had never been served with the Notice of Seizure and intended forfeiture as required by Section 11613 of the Health and Safety Code and on the further ground that he had a valid defense to the action on the merits. His motion alleged that he had been arrested and jailed and had remained incarcerated, that the State authorities knew these facts, that they mailed the Notice of intended forfeiture to his Glendale address and that subsequently the unopened letter was returned to the State authorities and they failed to deliver it to him in jail or otherwise. The trial court vacated the Order of forfeiture and from this Order the State appealed. On appeal the State contended that service on the legal owner of the seizure and intended forfeiture was made in exact compliance with the provisions of the Health and Safety Code. In affirming the Order vacating

the default Judgment of forfeiture, the Appellate Court said:

> "Due process is a variable concept. Whether it has been violated depends upon the facts of the case. *Where alternatives are given it requires that that alternative reasonably calculated to notify the person affected must be used.*" (Emphasis added—the alternative referred to *personal* service.)

In *Farmers v. National Bank*, 25 Cal. 2d 842, the California Supreme Court said:

> "Courts should be particularly alert to require compliance with statutory provisions relating to constructive notice for a departure therefore constitutes a denial of due process of law."

In *Bruhnke v. Golden West*, 56 Cal. App. 2d Supp. 943, 948, the Appellate Department of the Los Angeles Superior Court in holding unconstitutional a statute dealing with constructive service upon a non-resident corporation said:

> "We have no precise definition for due process of law. Its fundamental requisites however are notice and the opportunity to be heard. (Citing cases.)
>
> "By due process is meant one which following the forms of law is appropriate to the case and just to the party to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained and whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justice of the judgment sought."

The Court, in quoting from *City of Los Angeles v. Oliver*, 102 Cal. App. 299, 323, then said:

> "As applied to judicial proceedings the phrase 'due process of law' imports an orderly proceeding adapted to the nature of the case in which a person is afforded an opportunity to be heard and to defend, enforce and protect his rights. It has the same meaning as the expression 'by the law of the land' as used in Magna Carta. * * * It was undoubtedly the purpose of the framers of both Constitutional guarantees to secure to every person a judicial trial according to the established rules of law before he could be deprived of either life, liberty or property."

The Court further quoted from *Seck v. Rensome*, 42 Cal. App. 674, as follows:

> "Broadly speaking it (due process) means that before a man's life or liberty or property may be taken by the State he must be given notice of the proceedings which may terminate in the taking and be given an opportunity to be heard in his own defense. It means further that the notice shall be a real and reasonable one and the hearing such as ordinarily or at least reasonably is given in similar cases."

In *Brecheen v. Riley*, 187 Cal. 124, a case which involved the power of the Real Estate Commissioner of the State of California to revoke a broker's license, the California Supreme Court said:

> "It is firmly established that it is the right of every person to pursue any lawful business or vocation he may select subject to such legal restrictions and regulations as the proper governmental authority may impose for the protection and safety

of society and that such right is valuable and must be protected and secured and cannot be taken from those who possess it without 'due process of law'."

In the case of *Fascination v. Hoover*, 39 Cal. 2d 260, a proceeding in mandamus was commenced to compel the issuance of a license to conduct an amusement business. One of the principal questions considered on appeal by the Supreme Court was whether the plaintiff was entitled to a formal notice and hearing of its application for the license. The Supreme Court referred to the case of *Martin v. Board of Supervisors*, 135 Cal. App. 96, where an application for license had been denied by the Board without notice or hearing. In that case on mandamus the Court directed the Board to afford the plaintiff a hearing, stating:

"When a Board of Supervisors is charged by law with the duty of issuing licenses upon specified terms and conditions that tribunal becomes a quasi judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Since a Board of Supervisors is only a quasi judicial body in its investigation and determination of the merits of petitions for licenses in conformity with the provisions of an ordinance its hearings must be somewhat informal and need not conform in all respects to the solemnity of a Court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for a license with an opportunity for the petitioner to present competent evidence for the consideration of the Board. * * * The Court added: It is true that an individual has no vested right to engage in the business of selling intoxicating liquor. * * * In spite of the fact that a vested right to engage in dispensing

of these beverages may not exist, still the law contemplates a fair and impartial hearing of any application for a license which has been filed in strict conformity with the law . . . it would be preposterous to concede that any judicial tribunal could be clothed with the arbitrary power of issuing licenses and regulating business subject only to its own caprice; that with or without a hearing on the merits of the application with or without reason or upon ex parte statements or rules with no opportunity of refuting them the Board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted. The law contemplates justice whether it is granted as a privilege or recognized as a vested right. We therefore conclude that the right to engage in the sale of beverages under the ordinance of Lake County may not be arbitrarily denied by the Board of Supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal. The Court then added *the Martin case has been cited with approval in cases involving the revocation of a license. People v. Nozzle,* 7 Cal. App. 2d 14, *Carroll v. California Horse Racing Board,* 16 Cal. 2d 164, *Irvine v. State Board of Equalization,* 40 Cal. App. 2d 280, *Trans Oceanic Oil Corporation v. Santa Barbara,* 85 Cal. App. 2d 776. And it has been held that unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy the statute will be interpreted to require a hearing." (Citing cases.) Other cases are in line with such statutory construction, the Court citing *Lloyd v. Elting,* 287 U. S. 329, and others.

In *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280, a petition was filed for a Writ of Mandate against the State Board of Equalization of the State of California. It was alleged that petitioner's license had been revoked and cancelled. The Notice of Revocation reciting that the cancellation of the license was made under authority of Article XX, Section 22 of the Constitution of the State of California. The petitioner in that case alleged that he was at no time notified of any hearing in connection with the revocation of his license and that the same was revoked without his knowledge. In its Answer, the State Board of Equalization admitted that the petitioner's license was revoked without any notice to him or knowledge upon his part and without any hearing at which petitioner was present, but alleged that the Board had made an investigation in order to determine whether or not petitioner's license should be revoked and that from the facts found as a result of said investigation the Board concluded and determined that the continuance of said license would be objectionable and contrary to public welfare and morals. The trial court ordered a peremptory Writ of Mandate to issue commanding the Board of Equalization to "forthwith reinstate the liquor license authorizing petitioner herein to sell alcoholic beverages at his cafe and restaurant. From such Judgment the State Board of Equalization prosecuted the appeal. Section 41 of the Alcoholic Beverage Control Act, the District Court of Appeal pointed out, provides:

> "The Board shall cause written notice of the time and place of hearing the * * * Complaint * * * to be given to the * * * licensee.

* * * "The position of appellant Board may be thus summarized. That because the *constitutional provision* Article XX, Section 22, *does not provide for any notice of hearing as a prerequisite to revocation of a license* that when the Board of Equalization acts independently and not upon any verified complaint filed by 'any person' no notice of such hearing is required and the license may be revoked without notice to the licensee and without affording him an opportunity to be heard. We cannot agree with this contention. We are not unmindful of the rules that there is no inherent right in a citizen to sell intoxicants; that a license so to do is not a proprietary right within the meaning of the due process clause of the Constitution (Constitution Article I, Section 13); that such license is not a contract but as characterized in *State Board of Equalization v. Superior Court*; 5 Cal. App. 2d 374, is but a permit to do what would otherwise be unlawful. Nevertheless *we cannot forget that the law contemplates justice whether the license is granted as a privilege or recognized as a vested right; that under the American system it is a policy of our law that a person should not be deprived even of a 'permit' to engage in a legitimate business without a fair and impartial hearing and without an opportunity to present competent evidence for consideration by the licensing authorities in opposition to the proposed revocation of his permit.* *Martin v. Board of Supervisors,* 135 Cal. App. 96, *Smith v. Foster,* 15 Fed. 2d 115."

Section 11505 of the Government Code now provides for the manner and method by which an Accusation may be made against the holder of a liquor license. It provides that upon the filing of the Accusation the agency shall

serve a copy thereof on the respondent as provided in subdivision c. Section c states:

"The Accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall be made by the agency unless the respondent *shall have been* SERVED *personally or by registered mail* as provided herein or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change and if a registered letter containing the Accusation and accompanying material is mailed addressed to respondent at the latest address on file with the Agency."

Section 11505 also provides:

"That the copy of the Accusation shall include or be accompanied by a statement that respondent may request a hearing by filing a Notice of Defense as provided in Section 11506 within fifteen days after service upon him of the Accusation and that failure to do so will constitute a waiver of his right to a hearing."

Since the petitioners in this case did not receive the Accusation no request was filed by them for a hearing by filing Notice of Defense. *The hearing that was held in this matter was thereafter held by the respondents without any further notice either by mail or personally, to the petitioners of the hearing that was held.* In doing so, the Department of Alcoholic Beverage Control interpreted Section 11505 to mean that if a licensee failed to request

a hearing by filing a Notice of Defense, that thereupon the Department of Alcoholic Beverage Control would be relieved of any duties to thereafter notify the licensee of the hearing being held for the purpose of determining whether the license should be suspended or revoked. *Section 11506 does not provide that notice of any hearing thereafter held will be forfeited by a licensee who fails to request a hearing by filing a Notice of Defense.* Presumably the legislature intended to authorize the Department of Alcoholic Beverage Control to proceed with suspension or revocation *without a hearing* where such a hearing was not specifically requested. However, *the Agency in this case did grant a hearing,* acting under the provisions of Section 11506, wherein it is provided as follows:

> "(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense and any such notice shall be deemed a specific denial of all parts of the Accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing *but the Agency in its discretion may nevertheless grant a hearing.*"

Section 11508 of the Government Code then provides:

> "The Agency shall determine the time and place of hearing. * * *"

Section 11509 of the Government Code then states:

> *"The Agency shall deliver or mail a notice of hearing to all parties at least ten days prior to the hearing.* The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense. * * *"

The Appeals Board erroneously determined that neither the Department of Alcoholic Beverage Control nor the Appeals Board were required to give effect to Section 11509 in those cases wherein a licensee had failed to file a Notice of Defense. If the Sections involved, 11505 to 11509, inclusive, could in any manner be interpreted to mean that a licensee was waiving the notice of any hearing thereafter held involving the matter of revocation or suspension of his license, such legislation constitutes a denial of due process of law. In *Carroll v. California Horse Racing Board*, 16 Cal. 2d 164, the question before the Supreme Court was whether the Horse Racing Board could suspend a license of a trainer of horses without affording the licensee a hearing. His signed application contained an agreement that the license might be summarily revoked or suspended by the Board. The Horse Racing Board held a meeting, considered evidence and adopted findings that a certain horse had been drugged and that the licensee at that time was its trainer. Upon these findings the Board ordered that the license should be suspended. The Superior Court found that the respondent was not notified of the fact that the Horse Racing Board was considering the suspension of his license and he was given no hearing prior to this action. His basic contention was that although under the rules of the Board a trainer is responsible for the condition of a horse in his charge the license may not be revoked without notice and hearing. The Supreme Court in holding the suspension to be in violation of the licensee's rights said:

> "The Board's argument is that the statute makes an express requirement of notice and hearing in the case of the removal of a member of the Board but omits any such requirement where the suspension or

revocation of a trainer's license is concerned. This omission is said to indicate a legislative intent not to require notice on hearing. The Board also stresses the alleged need for summary action in these situations.

"This argument, although not without persuasive force fails to give effect to the provision in Section 3 that no license may be revoked 'without just cause.' This phrase is familiar in licensing statutes and has been generally recognized as implying a right to notice on hearing. It would be difficult to give it any other interpretation for the determination of 'just cause' necessarily requires a fair consideration of any evidence offered by the accused."

After citing a number of cases, all to the effect that a license could not be revoked without notice on hearing, the Supreme Court continued as follows:

"The authorities cited above indicate that statutory provisions requiring 'cause' for revocation of licenses or removal of offices carry with them by implication the right to notice and hearing. The legislature must be deemed to have enacted the present statute with knowledge of these decisions, and therefore by the use of the words 'without just cause' to have intended to require notice and hearing as a condition to the revocation of the license issued under the Horse Racing Act.

"It is true that the opinion in State Board of Equalization v. Superior Court, 5 Cal. App. 2d 374, *a case dealing with a liquor license expresses a view contrary to the foregoing decisions but without any consideration of them. But the conclusion reached in that case is contrary to both principle and authority and it is disapproved to the extent that it is inconsistent with the present decision.*

"Also there is no merit in the contention that the respondent waived his right to a hearing by signing the application for a license. If the application and license issued upon it purport to deny this right, the Board in forcing petitioner to give up his statutory right was acting wholly beyond its power. An administrative Board may not evade the provisions of a statute by any such method."

In *Trans-Oceanic v. Santa Barbara*, 85 Cal. App. 2d 776, 797, the *Irvine* case is cited with approval. There the District Court of Appeal held that an attempted revocation of a permit to drill for oil without notice of hearing was a violation of the Fourteenth Amendment. The Court said "The resolution of revocation in the instant case adopted without notice or hearing or reception of competent evidence was inoperative and of no legal force." The Court added:

"The attempted revocation of the permit after appellant had acquired a vested right to drill well No. 8 and if oil was found to extract it constituted a deprivation of appellant's property and a contravention of the 14th Amendment to the Constitution of the United States and Article I, section 13 of the Constitution of California."

In the case of *Covert v. State Board of Equalization*, 29 Cal. 2d 125, the Superior Court issued a writ of mandate, directing the State Board of Equalization to revoke the on-sale liquor license of an operator of a cafe on the ground that the premises constituted a public saloon and not a bona fide residence contrary to Section 22 of Article 20 of the California Constitution. In reversing the trial court, the State Supreme Court said "In order to revoke a license the Board obviously must examine the facts,

resolve any conflicts in the evidence and exercise its judgment with respect thereto. A revocation may be only "for good cause" and accordingly the Board must afford an opportunity for a full hearing and essential element of a quasi judicial proceeding. In *Martin v. Board of Supervisors*, 135 Cal. App. 96, proceedings in mandamus were filed to compel the Board of Supervisors to issue a license to sell non-intoxicating beverages. It was contended the application was arbitrarily denied without affording the petitioner an opportunity for a legal hearing thereof. In granting the writ for mandamus directing the Board of Supervisors to grant petitioner a hearing and to afford her the opportunity of presenting competent evidence thereof in support of her application for a license the District Court of Appeal said:

> "It would be preposterous to concede that any judicial tribunal could be closed with the arbitrary power of issuing licenses and regulating business subject only to its own caprice; that with or without a hearing on the merits of the application, with or without reason, or upon ex parte statement of rumors with no opportunity of refuting them, the board could grant or deny a petition for license. This is not the purpose or spirit with which regulatory statutes are enacted. Law contemplates justice whether it is granted as a privilege or recognized as a vested right. We therefore conclude that the right to engage in the sale of beverages under the ordinance of Lake County may not be arbitrarily denied by the Board of Supervisors without a hearing or an opportunity on the part of the petitioner to present the merits of her application to the licensing tribunal."

In *Stoumen v. Reilly*, 37 Cal. 2d 713, proceedings in mandamus were instituted to compel the State Board of

Equalization to annul its order suspending a liquor license and reinstate the licens. Judgment denying the writ was reversed by the Supreme Court with directions. On appeal, the Supreme Court said:

> "Defendants contend that even though the evidence is insufficient to show a violation of Section 58, the license could be suspended under Section 22 of Article 20 of the Constitution which provides that the Board 'shall have the power in its discretion to deny or revoke any specific liquor license if it shall determine for good cause or the granting or continuance of such license would be contrary to public welfare or morals.' * * * The Board's discretion under section 22, however, is not absolute but must be exercised in accordance with the law and the provision that it may revoke a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals."

In *Fascination v. Hoover*, 39 Cal. 2d 260, the Supreme Court reviewed all of the various decisions pertaining to revocation of liquor licenses and companion cases and then stated:

> "And it has been held that unless the statute expressly provides to the contrary a license cannot be revoked without a hearing where the statute contemplates a quasi judicial determination by the administrative agency that there be cause for the revocation; that because of reasons of justice and policy the statute will be interpreted to require a hearing." (Citing cases.)

It is therefore clear from the foregoing cases that the respondents, Department of Alcoholic Beverage Control, could only act after notice and hearing of the hearing

after the agency, in its discretion, had granted the hearing. That with respect to such a hearing, compliance with notice was required under the due process clause of the 5th and 14th Amendments to the Federal Constitution. That under these Amendments there must be notice of the hearing, an opportunity to be present in person or by counsel during the taking of the testimony, to know the nature and the contents of all testimony and to present all relevant evidence and contentions, *i.e.*, the petitioners must have "their day in Court." The revocation therefore ordered by the Department of Alcoholic Beverage Control, as well as the suspension, was in violation of the constitutional rights of the petitioners.

II.

Due Process of Law Was Denied to Petitioners by the Department of Alcoholic Beverage Control in Refusing to Reconsider the First Decision of Revocation on the Ground That Petitioners Had Not Received Notice of the Hearing.

The petitioners filed a Petition for Reconsideration with the Department of Alcoholic Beverage Control on August 2, 1956. This Petition was filed under the provisions of Section 11521 of the Government Code, which in part provides that the Agency itself may order a reconsideration of all or part of the case on its own motion or on the petition of any party. The grounds upon which the Petition for Reconsideration was based was that the Accusation had never been received by the petitioners and that no notice of the hearing was given to the petitioners. This Petition was denied by the Department of Alcoholic Beverage Control on August 6, 1956.

In the case of *People v. One 1950 Mercury Sedan,* 116 Cal. App. 2d 746, proceedings were instituted to forfeit an automobile ostensibly used to transport a narcotic. Notice of Seizure of the automobile was filed in the Superior Court and a copy of the Notice mailed to the legal owner on the same day. The Superior Court struck out the Answer because it had not been filed within twenty days after mailing of the Notice of Seizure. The Superior Court denied a motion under Section 473 of the Code of Civil Procedure by the legal owner to be relieved of its default. In reversing the Order of the trial Court denying relief under Section 473 of the Code of Civil Procedure, the Appellate Court said:

> "In this case to deny the legal owner the right to appeal and defend against the asserted forfeiture was to deny him due process of law. Any other construction would be to destroy the element of fairness implicit in our American system of justice. For justice is always the controlling consideration under our law. In no field of that law is due process more essential than in this present day legislative resurrection of ancient medieval concept of the deodand. * * *"

The Court then added:

> "Relief from defaults in law cases in proper circumstances is an integral part of due process of law in California. Therefore it was an abuse of discretion for the Court to strike the Answer from the file and to deny relief under Section 473 of the Code of Civil Procedure."

To the same effect is the case of *People v. One 1941 Chrysler Sedan,* 81 Cal. App. 2d 18, 30, *supra,* where a motion to set aside a judgment of forfeiture was granted

by the trial Court vacating a default judgment. In holding that Section 473 was applicable, the Court said:

> "But where the service made is an invalid service the Court never acquires jurisdiction. The Judgment based on such service is void and may be collaterally or otherwise attacked (by motion if seasonably made or by a suit in equity."

The Court then went on to add that the notice of intended forfeiture mailed to the owner of the automobile and which had been returned to them unopened was inadequate since the narcotic inspectors knew that they had previously arrested the petitioner in that case and that he was still in jail.

Section 11,521 of the Government Code may be likened to Section 473 of the Code of Civil Procedure and a denial of the petition for reconsideration based upon the ground that the petitioners had not received notice of the hearing was a second denial of due process of law to the petitioners.

In *Moyer v. State Board of Equalization,* 140 Cal. App. 2d 651, a proceeding in mandamus was filed to review an order of the State Board of Equalization suspending liquor licenses. A judgment denying the writ was reversed with directions. In that case, a petition for reconsideration was filed and granted but at the hearing held on the reconsideration, three members of the Board without a hearing officer being present. The appellant contended that the Board proceeded in violation of the manner required by law and was without jurisdiction to so proceed in several respects. It was contended that the law required the presence of the hearing officer at the hearing on reconsideration. The Appellate Court reversed the

judgment of the trial court with directions to amend its findings and to grant a peremptory writ of mandate commanding the Department of Alcoholic Beverage Control to set aside the order made by the Board on the reconsideration. The court said:

> "we hold that in the absence of an express statutory exception the provision of 11,512 requiring a hearing officer to preside was applicable to the hearing on reconsideration in this case and that in holding said hearing without a hearing officer, the Board did not proceed in the manner required by law and acted in excess of its jurisdiction."

Similarly in this case where the Department refused to *act* on the petition for reconsideration upon a petition alleging that notice of a hearing held in which a license was revoked had not been granted was not in compliance with the applicable law and was a denial of due process of law.

III.

The Petitioners Were Denied Due Process of Law by the Department of Alcoholic Beverage Control in Refusing to Allow Petitioners the Right to Present Evidence by Way of Mitigation as Provided for by Section 11520 of the Government Code.

Section 11520 of the Government Code provides that if the respondent fails to file a Notice of Defense or to appear at the hearing the Agency itself may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent. But this section also provides:

> "Nothing herein shall be construed to deprive the respondent of the right to make any showing by way of mitigation."

On February 25, 1957, after the Appeals Board had reversed the decision of the Department as to Count V, and had remanded the case to the Director of the Department of Alcoholic Beverage Control, the petitioners, proceeding under Section 11520, filed a Petition requesting that they be allowed to make a showing by way of mitigation. No action was taken by the Department on that Petition, and thereafter the Department did, on March 7, 1957, without granting the petitioners the right to present any evidence by way of mitigation order that the petitioners' license should be suspended for thirty days on one count, and the said license revoked on a second count. In failing and in refusing to grant the petitioners the right to present evidence by way of mitigation as provided for in Section 11520 of the Government Code, due process of law was for the third time denied the petitioners.

IV.

The Petitioners Were Denied Due Process of Law by the Alcoholic Beverage Control Appeals Board in Remanding the Case to the Department After Making a Reversal of Count V for Reconsideration by the Department of the Penalty but Including in the Decision a Statement That the Incidents Are Ample to Support an Order of Revocation.

It has now been fully established by the California decisions, that where an agency exercising statewide jurisdiction has imposed a single penalty based on multiple charges of misconduct and the Appeals Board holds some of them to be unsupported, that the practice is to return the case to the administrative agency with a direction to reconsider the penalty to be imposed. The Appeals Board recognized that they were so bound in reversing the Order

of Revocation. However, in its decision in reversing the Order of Revocation, the Appeals Board said:

> "This Board must *reluctantly* under the compulsion of *Bonham v. McConnell,* 45 Cal. 2d 304, reverse the present decision to afford the Director of the Department of Alcoholic Beverage Control an opportunity to evaluate the penalty in the light of the specific incidents which have been found not to be supported by substantial evidence. It is the opinion of this Board that *the incidents which are supported by substantial evidence are ample to warrant an Order of Revocation* and in the absence of the precedent of the *Bonham* case, *this Board would affirm the Department's decision.*" (Emphasis added.)

It is your petitioners' contention that the inclusion of the preceding language in the Order of Reversal, is a violation of the constitutional rights of the petitioners to a fair and impartial hearing. In effect, the Appeals Board used its powerful influence with the Department by suggesting to them that despite their obligation to reverse the Order of Revocation they would, were it not for the Supreme Court decision of *Bonham v. McConnell, supra,* have affirmed the Department's decision. This constituted a most flagrant interference with the obligation of the Department to exercise its own discretion as to the penalty upon a reversal of the Order of Revocation. In *Bonham v. McConnell,* 45 Cal. 2d 304, the Supreme Court there said:

> "Where some of the findings are not supported by the evidence, it is obvious that his (the Insurance Commissioner) discretion has been exercised under a misconception as to the extent of the licensee's misconduct. If the case is not remanded the Commissioner will not be afforded an opportunity to

exercise *his discretion* in the light of the established facts and thus perform the function entrusted to him by the legislature. The decisions involving misconduct have generally adopted the practice of directing the Administrative agency to reconsider the penalty to be imposed."

The action of the Appeals Board in including in its decision that an Order of Revocation would be warranted was clearly an invasion of the province which had been entrusted to the Department. That the Department was unduly influenced is clearly revealed by the refusal of the Department thereafter to permit the petitioners to present evidence by way of mitigation and by the conduct of the Department in summarily rendering a second Order of Revocation.

V.

Petitioners Were Denied Their Constitutional Rights by the Superior Court of Los Angeles County, the District Court of Appeal, and the State Supreme Court in Refusing to Set Aside the Decisions of the Department of Alcoholic Beverage Control and of the Alcoholic Beverage Control Appeals Board.

Both the Superior Court and the District Court of Appeal and apparently the Supreme Court proceeded on the erroneous theory that the Courts had no authority to grant the Petition of the petitioners in mandamus to review the proceedings that had taken place before the Department of Alcoholic Beverage Control on the ground that the petitioners had not exhausted their administrative remedies. In this, the Superior Court, as well as the District Court of Appeal and the State Supreme Court, erred. Although it is the general rule that ad-

ministrative remedies must first be exhausted before relief can be granted by the Courts, as stated in the case of *County of Los Angeles v. Department of Social Welfare*, 41 Cal. 2d 455, and the cases there cited, there are exceptions to the general rule requiring the exhaustion of administrative remedies where a State Board lacks jurisdiction over the subject matter or of the person in the proceedings.

To the same effect is the case of *Dickens v. Dickens*, 82 Cal. App. 2d 717, where the court said,

> "Administrative proceedings should be completed before the issuance of a judicial merit. *An exception of course appears when the administrative board is without jurisdiction.*"

In *Beck v. Ransome*, 42 Cal. App. 674, the Appellate Court said,

> "When an assessment is attacked on the ground that the local Board failed to acquire original jurisdiction, the owner may rest on the constitutional guarantee that his property may not be taken without due process of law. If jurisdiction is lacking no equities asserted by the contractor can prevail. If the invalidity of the initial resolution of intention is apparent on its face the owner is not required to seek its correction by appeal to the council. He may stand upon his rights whenever an attempt is made to assert any claim based on an assessment void on its face."

And in *County of Alpine v. County of Tuolumne*, 49 Cal. 2d 787, *supra*, decided by the Supreme Court in March, 1958, the Supreme Court said:

> "Defendants rely on the established rule that 'where an administrative remedy is provided by stat-

ute relief must be sought before the administrative body and this remedy exhausted before the Courts will act'." (Citing *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280), and that "It lies within the power of the administrative agency to determine in the first instance and before judicial relief may be obtained whether a given controversy falls within the statutory grant of jurisdiction." (Citing *United States v. Superior Court*, 19 Cal. 2d 189.) "But these rules are inapplicable where, as here, the agency is given no jurisdiction to make a judicial determination of the type involved."

It is doubtful whether petitioners should be compelled to exhaust administrative remedies when the administrative remedy (on appeal) to which they would have been subjected would have been limited to a consideration of evidence presented at a default hearing to which petitioners were not a party, where evidence had been presented without being subjected to the appropriate cross-examination, where evidence had been presented solely by the prosecution and without any evidence on behalf of defendants. It is further doubtful whether the exhaustion of administrative remedies may be applied when, as in this case, the petitioners had also been denied a hearing to present evidence by way of mitigation or in support of their petition for reconsideration.

In the case of *Ware v. Retirement Board*, 65 Cal. App. 2d 781, the Court there said:

"Where a Board has held a hearing and after hearing determined the matter pending before it and the statute permits a Petition for Rehearing, it may be that the rule of exhaustion of administrative remedies requires the petitioner to avail himself of that remedy even though by statute it is permissive and

not mandatory. That is the rule that was announced by the majority of the Court in the Alexander case, supra, and this Court, as an intermediate appellate court is bound thereby. But the rule of that case should not be extended to cases where no hearing at all has been granted by the Board, the Board simply refusing to act. That is the present case. Mrs. Rosetti applied for a hearing of her application and the Board refused to grant her a hearing on the ground that she was barred as a matter of law. When no hearing has been granted no Petition for Rehearing is required. There was no 'determination' of the Board based on evidence. There was simply a ruling that as a *matter of law the Board would* not act on the Petition because the applicant had no rights as a member of the retirement system. Non-action is not the same as action. We conclude that where an administrative Board refuses to act and the statute governing such Board contains a permissive and not mandatory provision for filing a Petition for Rehearing, the filing of such a Petition is not indispensible condition precedent to filing a Petition for Mandate to compel the Board to act."

In the case of *Flynn v. Chiaperi,* 191 Cal. 139, 148, an appeal was taken from a judgment foreclosing a lien for certain street improvements. The property owner contended that he had been denied due process of law in that he had not received notice of the proposed assessment. It was asserted by the municipality that there were provisions for the taking of an appeal and for hearing on appeal. In holding that the right of an appeal would not cure the omission of notice of the proposed assessment the Supreme Court said:

"But manifestly an opportunity to appeal is of no value to a property owner who because of insufficient

notice has never had an adequate opportunity for a hearing in the first instance. The curative provisions in the ordinance do not and cannot operate to cure the omission of such notice as was necessary to satisfy the requirements of due process."

In *County of Los Angeles v. Department of Social Welfare*, 41 Cal. 2d 456, an appeal was taken from a judgment granting a writ of mandamus to compel the Department of Social Welfare to set aside orders with respect to administration of county relief to indigents. The issue of the exhaustion of remedies was presented. In upholding the exception of the general rule the Supreme Court said:

"A preliminary question is presented as to whether it was necessary for the County to apply for a hearing before the Board as a condition precedent to the maintenance of this proceeding. There are exceptions to the general rules requiring the exhaustion of administrative remedies and if as contended by the county the State Board lacked jurisdiction over the subject matter or the proceedings, it was not necessary for the county to seek a rehearing before the Board."

Conclusion.

It is only when the Board has acted within its jurisdiction and has complied with the administrative procedure that a revocation of a license cannot be successfully assailed as a deprivation of property without due process. (*Cooper v. State Board of Equalization*, 137 Cal. App. 2d 672, 679.)

It has been held that a statute valid on its face may be unconstitutionally applied. (*Brock v. Superior Court*, 12 Cal. 2d 605.)

It is respectfully submitted that the Department of Alcoholic Beverage Control has erroneously concluded that it need not serve notice of hearing to revoke a license and that in arriving at this conclusion it has violated the fundamental rights of the petitioners.

Petitioners pray that the writ of certiorari be granted.

Respectfully submitted,

PHILL SILVER,

Attorney for Petitioners.

EXHIBIT A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Cy Miller and Billie Miller, Petitioners and Appellants, vs. Department of Alcoholic Beverage Control; Alcoholic Beverage Control Appeals Board, Defendants and Respondents. Civil No. 22473.

May 20, 1958.

Appeal from Judgment of the Superior Court of Los Angeles County. Bayard Rhone, Judge. Affirmed.

For Appellants: Moore, Webster, Lindelof & Hughes, by Prentiss Moore.

For Respondents: Edmund G. Brown, Attorney General, Edward M. Belasco, Deputy Attorney General.

Appeal from a judgment denying petitioners' application for a writ of mandate to review an order of the Department of Alcoholic Beverage Control revoking petitioners' on-sale liquor license.

An accusation containing five counts was filed with the respondent department, four of which charged that petitioners sold alcoholic beverages to minors, and count V charging that petitioners permitted their licensed premises to be used as a place to which persons resorted in a drunken condition and used obscene, indecent and profane language within the hearing of the public which created a condition contrary to public welfare and morals.

The accusation, accompanied by a form of notice of defense, was served upon petitioners by certified mail on March 22, 1956, addressed to their licensed premises. Service of accusation in this manner is authorized by Government Code sections 8401 and 11505(c).

Petitioners did not file a notice of defense, and on June 4, 1956, a default hearing, at which petitioners did not appear, was held before a hearing officer of the department at which 25 police officers testified in support of the charges contained in the accusation.

After the hearing was concluded, petitioners' counsel informally requested the hearing officer to rehear the matter, which request was denied. On the same day, petitioners' counsel addressed a letter t the department requesting that the hearing be set aside and the matter reheard upon the ground that the petitioners had not received notice of the hearing. This request was likewise denied.

The hearing officer rendered a proposed decision in which counts, I, III and IV were dismissed and petitioners were found guilty of the charge in count II, for permitting a minor to consume an alcoholic beverage on their licensed premises, on which count a 30-day suspension was recommended. The hearing officer also found petitioners guilty of some 22 particulars of improper conduct charged in count V and recommended that their license be revoked.

On July 5, 1956, the department adopted the proposed decision as its own, imposed a 30-day suspension under count II and revoked their license under count V. Petitioners thereupon filed a petition for reconsideration upon the ground that they had not received notice of the hearing, which petition was denied.

Petitioners thereafter filed an appeal with the Appeals Board, upon which a hearing was had and the matter argued by counsel. On January 21, 1957, the Appeals Board mailed to the parties its decision upholding the suspension under count II and reversing the revocation under count V but restricting the reversal to the question of the penalty to be imposed under this count. The Ap-

peals Board determined that a number, but not all, of the charges set forth in count V were supported by substantial evidence and that those charges so supported were sufficient to support an order of revocation by the department. The Appeals Board, in compliance with the decision in Bonham v. McConnell, 45 Cal. 2d 304, remanded the proceedings to the department for a reconsideration of the penalty, either upon the facts found to be true or to conduct a further hearing to substantiate all of the facts set forth in the accusation.

Petitioners did not seek a review of the decision of the Appeals Board by a proceeding in mandate but on February 25, 1957, filed with the department a petition for further hearing in which to present evidence in mitigation. No affirmative action appears to have been taken upon this application, but it was apparently denied for on March 7, 1957, without further hearing or the taking of additional evidence, the department reconsidered the penalty to be imposed under count V in the light of the decision of the Appeals Board and rendered a new decision suspending petitioners' license for 30 days on count II and revoking their license on count V.

Petitioners failed to file an appeal to the Appeals Board from this last decision and order of the department but instead, on April 11, 1957, filed this proceeding for a writ of mandate. Upon the hearing of the petition and the return by way of answer thereto, the trial court ordered the alternative writ discharged and denied a peremptory writ.

The trial court made and filed findings of fact and conclusions of law wherein, among other things, it found that petitioners did not appeal to the Appeals Board from the decision of the department rendered on March 7, 1957,

revoking their license and that the 40-day period within which such an appeal could be filed had expired. From this it concluded that petitioners had failed to exhaust their administrative remedies, as a consequence of which they were not entitled to a judicial review of the order complained of. Accepting this finding as true, there can be no doubt as to the correctness of the trial court's judgment. As said by this court in Fiscus v. Dept. Alcoholic Bev. Control (1957), 155 A. C. A. 271, 273:

"Prior to January 1, 1955, the agency with the power to license the sale of intoxicating liquor was the Board of Equalization. (Marcucci v. Board of Equalization, 138 Cal. App. 2d 605, 608 [292 P. 2d 264].) There was no appeal from its decisions. The only remedy of an aggrieved party was to file a petition in the superior court for a writ of mandate within 30 days after the order of the board became final, seeking a review in accord with section 1094.5 of the Code of Civil Procedure. Since January 1, 1955, section 22 of Article XX of the Constitution, implemented by sections 23080-23091 of the Business and Professions Code, has provided for an appeal from a decision of the department. Section 24301 of the Business and Professions Code Reads:

"'Subject to the provisions of section 22 of Article XX of the Constitution, any ruling, order, or decision of the department is subject to review as provided by law in any court of competent jurisdiction in the county in which the person affected resides.'

"'Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. (Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292 [109 P. 2d 942, 132 A. L. R. 715].) Exhaus-

tion of administrative remedies is a jurisdiction prerequisite to resort to the courts. (Abelleira v. District Court of Appeal, supra, p. 293; United States v. Superior Court, 19 Cal. 2d 189, 194 [120 P. 2d 26].) The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy a condition of the right to resort to the courts. (First Nat. Bank v. Board of County Comrs., 264 U. S. 450 [44 S. Ct. 385, 68 L. Ed. 784, 788-789].)' "

In Abelleira v. District Court of Appeal, 17 Cal. 2d 280, where the Supreme Court issued a writ of prohibition restraining the District Court of Appeal from entertaining an application for a writ of mandate to review the action of the California Employment Commission, it is said (p. 291):

"Lack of jurisdiction in the District Court of Appeal to issue its writ of mandate is clearly established when the foregoing principles are considered in connection with a settled doctrine of administrative law. The Unemployment Insurance Act, summarized above, contains a complete administrative procedure, with provision for one original determination and two appeals, fulfilling every requisite of due process of law. Until that administrative procedure has been invoked and completed, there is nothing that the District Court of Appeal or any other court may review; it cannot interfere in the intermediate stages of the proceeding. The employers have no standing to ask for judicial relief because they have not yet exhausted the remedies given them by the statute. They still have their appeal to the commission, which appeal has not yet been decided adversely to them, and prior to the prosecution of this appeal they have no right to demand an extraordinary writ from a court."

And at page 293 we find the following:

"Bearing in mind the analysis of jurisdiction which has heretofore been made, and examining the authorities dealing with the rule, we are necessarily led to the conclusion that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts."

The foregoing rule is applicable even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds. (United States v. Superior Court (1941), 19 Cal. 2d 189, 195.)

Petitioners, while tacitly admitting that they did not appeal to the Appeals Board from the order of revocation, nevertheless contend that the trial court's finding that no such appeal was taken is unsupported by the evidence. This, by reason of the fact that in the petition in this proceeding it is alleged "That petitioners have exhausted all remedies provided them under the Alcoholic Beverage Control Act and the Government Code and your petitioners have no plain, speedy or adequate remedy at law or further right of appeal and no remedy under the laws of the State of California except to file this petition for Writ of Mandate," which allegation is admitted in respondents' return. They seek to support their contention in this regard by reference to those authorities in this State which declare that a finding which is contrary to a fact admitted by the pleadings, must be disregarded. (Hibernia Sav. etc. Soc. v. Dickinson (1914), 167 Cal. 616-619.) This is undoubtedly the general rule but it is inapplicable under the circumstances here. In their petition, petitioners specifically set forth all of the proceedings had and taken by them before the respondent department, and these do not include the taking of an appeal to the Appeals Board from the order of revo-

cation sought to be reviewed herein. Moreover, the record filed with their petition, certified to be a true, correct and complete transcript of the proceedings had before the respondent department, does not disclose that any such appeal was taken. The allegation in the petition that the petitioners have exhausted all of their administrative remedies, is a mere conclusion, which is contrary to the specific facts alleged and shown to exist by the record of the proceedings had before the department. As a consequence the conclusion, being contrary to the specific facts alleged, must be disregarded. (39 Cal. Jur. 2d, p. 51, §31; Kidwell v. Ketler (1905), 146 Cal. 12, 17-18; Gorewisch v. Doran (1911), 161 Cal. 511, 515-516.) And the allegation that petitioners were without the right to appeal from the order of revocation being contrary to a fact of which the court takes judicial notice, must likewise be disregarded. (39 Cal. Jur. 2d, p. 35, §22.)

As we have seen, the trial court was without jurisdiction to entertain petitioners' application for a writ of mandate to review the action of the respondent department absent the exhaustion by petitioners of their administrative remedies. Therefore, when it was made to appear to the trial court by suggestion or otherwise that petitioners had not availed themselves of the right to appeal to the Appeals Board, it became its duty to refuse to proceed further. And this despite the fact that the petitioners may have alleged by way of conclusion, which the respondents admitted, that they had exhausted their administrative remedies, for it is *exiomatic* that parties may not by consent confer jurisdiction over the subject matter of an action where none exists. In People v. Shaw (1927), 81 Cal. App. 312, 316, the following ex-

cerpts from 7 Ruling Case Law, p. 1043, section 75 is quoted with approval:

"'A court will recognize want of jurisdiction over the subject matter even if no objection is made, and therefore whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case. As heretofore shown, the jurisdiction of a court over the subject matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court, as such, by the consent of the parties.'"

The judgment is affirmed.

PATROSSO, *J. pro tempore.*

We concur:

WOOD, *Acting P. J.*

VALLÉE, *J.*

EXHIBIT B.

Government Code.

SEC. 11500. DEFINITIONS.

In this chapter unless the context or subject matter otherwise requires:

(a) "Agency" includes the state boards, commissions and officers enumerated in Section 11501 and those to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide.

(b) "Party" includes the agency, the respondent and any person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding.

(c) "Respondent" means any person against whom an accusation is filed pursuant to Section 11503 or against whom a statement of issues is filed pursuant to Section 11504.

(d) "Hearing officer" means a hearing officer qualified under Section 11502.

(e) "Agency member" means any person who is a member of any agency to which this chapter is applicable and includes any person who himself constitutes an agency. (Added Stats. 1945, c. 867, p. 1626, Sec. 1, as amended Stats. 1947, c. 491, p. 1469, Sec. 1.)

SEC. 11593. REVOCATION, ETC., OF RIGHT, AUTHORITY, LICENSE OR PRIVILEGE; ACCUSATION, CONTENTS, VERIFICATION.

A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary, and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief. (Added Stats. 1945, c. 867, p. 1628, Sec. 1, as amended Stats. 1947, c. 491, p. 1470, Sec. 3.)

SEC. 15505. SERVICE OF ACCUSATION; NOTICE OF DEFENSE; REQUEST FOR HEARING.

(a) Upon the filing of the accusation the agency shall serve a copy thereof on the respondent as provided in subdivision (c). The agency may include with the accusation any information which it deems appropriate, but it shall include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of de-

fense under Sec. 11506. The copy of the accusation shall include or be accompanied by a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon him of the accusation, and that failure to do so will constitute a waiver of his right to a hearing.

(b) The statement to respondent shall be substantially in the following form:

Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, (here insert name of agency) may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled Notice of Defense, or by delivering or mailing a notice of defense as provided by Section 11506 of the Government Code to: (here insert name and address of agency).

(c) The accusation and all accompanying information may be sent to respondent by any means selected by the agency. But no order adversely affecting the rights of the respondent shall have been served personally or by registered mail as provided herein, or shall have filed a notice of defense or otherwise appeared. Service may be proved in the manner authorized in civil actions. Service by registered mail shall be effective if a statute or agency rule requires respondent to file his address with the agency and to notify the agency of any change, and if a regis-

tered letter containing the accusation and accompanying material is mailed, addressed to respondent at the latest address on file with the agency. (Added Stats. 1945, c. 867, p. 1628, Sec. 1.)

SEC. 11506. NOTICE OF DEFENSE, CONTENTS, TIME OF FILING, EFFECT, FORM; RIGHT TO HEARING, WAIVER.

(a) Within 15 days after service upon him of the accusation the respondent may file with the agency a notice of defense in which he may:

(1) Request a hearing;

(2) Object to the accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;

(3) Object to the form of the accusation on the ground that it is so indefinite or uncertain that he cannot identify the transaction or prepare his defense;

(4) Admit the accusation in whole or in part;

(5) Present new matter by way of defense.

Within the time specified respondent may file one or more notices of defense upon any or all of these grounds, but all such notices shall be filed within that period unless the agency in its discretion authorizes the filing of a later notice.

(b) The respondent shall be entitled to a hearing on the merits if he files a notice of defense, and any such notice shall be deemed a specific denial of all parts of the accusation not expressly admitted. Failure to file such notice shall constitute a waiver of respondent's right to a hearing, but the agency in its discretion may nevertheless grant a hearing. Unless objection is taken as provided in subdivision (a)(3), all objections to the form of the accusation shall be deemed waived.

(c) The notice of defense shall be in writing signed by or on behalf of the respondent and shall state his mailing address. It need not be verified or follow any particular form. (Added Stats. 7945, c. 867, p. 1629, Sec. 1.)

SEC. 11509. NOTICE OF HEARING.

The agency shall deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense.

The notice to respondent shall be substantially in the following form but may include other information:

You are hereby notified that a hearing will be held before (here insert name of agency) at (here insert place of hearing) on the ..... day of ....., 19...., at the hour of ....., upon the charges made in the accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other things applying to (here insert appropriate office of agency). (Added Stats. 1945, c. 867, p. 1630, Sec. 1.)

SEC. 11513. EVIDENCE; EXAMINATION OF WITNESSES.

(a) Oral evidence shall be taken only on oath or affirmation.

(b) Each party shall have these rights: to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues

even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him to testify; and to rebut the evidence against him. If respondent does not testify in his own behalf he may be called and examined as if under cross-examination.

(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the same extent that they are now or hereafter may be recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded. (Added Stats. 1945, c. 867, p. 1632, Sec. 1.)

SEC. 11520. DEFAULTS AND UNCONTESTED CASES; MITIGATION.

If the respondent fails to file a notice of defense or to appear at the hearing, the agency itself may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that he is entitled to the agency action sought, the agency may act without taking evidence. Nothing herein shall be con-

strued to deprive the respondent of the right to make any showing by way of mitigation. (Added Stats. 1945, c. 867, p. 1634, Sec. 1, as amended Stats. 1947, c. 491, p. 1472, Sec. 8.)

SEC. 11521. RECONSIDERATION.

(a) The agency itself may order a reconsideration of all or part of the case on its own motion or on petition of any party. The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to respondent, or on the date set by the agency itself as the effective date of the decision if such date occurs prior to the expiration of the 30 day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If no action is taken on a petition within the time allowed for ordering reconsideration the petition shall be deemed denied.

(b) The case may be reconsidered by the agency itself on all the pertinent parts of the record and such additional evidence and argument as may be permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer shall be subject to the procedure provided in Section 11517. If oral evidence is introduced before the agency itself no agency member may vote unless he heard the evidence. (Added Stats. 1945, c. 867, p. 1634, Sec. 1, as amended Stats. 1963, c. 964, p. 2340, Sec. 1.)

SEC. 11523. JUDICIAL REVIEW.

Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30

days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner within 30 days after a request therefor by him, upon the payment of the fee specified in Section 274 of the Code of Civil Procedure as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, and proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the agency to prepare all or any part of the record the time within which a petition may be filed shall be extended until five days after its delivery to him. The agency may file with the court the original of any document in the record in lieu of a copy thereof. (Added Stats. 1945, c. 867, p. 1635, Sec. 1, as amended Stats. 1947, c. 491, p. 1472, Sec. 9; Stats. 1953, c. 962, p. 2339, Sec. 1.)